No. 97-.....

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In the Supreme Court

OF THE

United States

October Term, 1997

AMERSIG GRAPHICS, INC., AND BOWNE OF PHOENIX, INC.,
Petitioners,

vs.

ESTATE OF JOSEPH E. WIDE[illegible]R, DECEASED
SUR TRUST FOR BENEFIT OF G. EUSTIS PAINE, III
AND
ESTATE OF JOSEPHINE WIDENER BIGELOW, DECEASED
SUR TRUST FOR BENEFIT OF G. EUSTIS PAINE, III,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA MIDDLE DISTRICT

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November 12, 1997

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QUESTIONS FOR REVIEW

1. Whether the Pennsylvania Supreme Court's affirmance of the quash of two writs of attachment of a spendthrift trust, in favor of a judgment debtor whose flight from the United States both allowed and yet rendered unenforceable the entry of default judgments against him worth over one million dollars, is an unconstitutional expansion of the spendthrift trust rule in violation of Petitioners' Fourteenth Amendment Rights and Their Article IV Privileges and Immunities?

2. Whether due process requires an interpretation of the Pennsylvania spendthrift trust rule so as to allow garnishment of the beneficiary's trust income in the possession of the Trustee on a continuing basis in order to prevent the use of international wire transfers to circumvent any domestic writ of attachment procedures?

RULE 29.6 STATEMENT OF PARTIES

Pursuant to Rule 29.6, Petitioners set forth their following parent companies and nonwholly owned subsidiaries. AmerSig Graphics, Inc., is wholly owned by Heller Financial, Inc. Amersig Graphics, Inc., has no nonwholly owned subsidiaries. Bowne of Phoenix, Inc., is wholly owned by Bowne & Co., Inc. Bowne of Phoenix, Inc., has no nonwholly owned subsidiaries.

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Respondents.

Petition for a Writ of Certiorari To The Supreme Court of the Commonwealth of Pennsylvania

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Petitioners AmerSig Graphics, Inc., and Bowne of Phoenix, Inc., ("Bowne and AmerSig" or "Petitioners") respectfully request that a writ of certiorari be issued to review the decisions and judgments of the Supreme Court of the Commonwealth of Pennsylvania, entered on August 13,

1997, which denied review of the decision of the Superior Court of Pennsylvania, which upheld the entry of summary judgment of the Pennsylvania Court of Common Pleas, Orphans' Court Division, in favor Respondent Trustee PNC Bank ("PNC Bank" or "Trustee") and against Petitioner's writ of attachment of two spendthrift trusts in the names of Joseph Widener and Josephine Widener Bigelow.

OPINIONS BELOW

The order of the Pennsylvania Supreme Court, denying review of the decision of the Pennsylvania Superior Court, was entered August 13, 1997, and is presented at Appendix D1. The judgment of the Pennsylvania Superior Court was entered on December 31, 1996, at No. 01355 Philadelphia 1995. The Superior Court's judgment and opinion have not been reported and are appended to this Petition at A1 - A7. The Honorable Stanley R. Ott of the Court of Common Pleas of Montgomery County, Orphans' Court Division, entered a Final Decree and accompanying Opinion, dated March 5, 1996, which Final Decree and Opinion are appended as B1 - B8.[1] The Joint Stipulation of the Parties in the Court of Common Pleas is appended at C1 - C5.

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[1] The Orphans' Court Opinion is reported at 16 Fiduc.Rep.2d (O.C.Montg. 1996).

STATEMENT OF JURISDICTION

The Order of the Pennsylvania Supreme Court was entered on August 13, 1997. This U.S. Supreme Court has jurisdiction to review the order of the Pennsylvania Supreme Court by writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This action involves the application of the Pennsylvania common law spendthrift trust rule in a manner which Petitioners allege constitutes a taking of contractual property rights in the absence of procedural due process and equal protection as guaranteed by the Fourteenth Amendment of the United States Constitution, and in violation of the Privileges and Immunities Clause of Article IV of the U.S. Constitution. Those provisions are set forth as follows.

1. Amendment XIV. § 1. Citizenship rights not to be abridged by states.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article IV. § 2. Privileges and immunities; fugitives.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

STATEMENT OF THE CASE

This is an appeal from a decision of the Pennsylvania Supreme Court affirming the dismissal of two writs of execution served upon Trustee PNC Bank by Petitioners Bowne and AmerSig.

This Petition regards two separate trusts held at PNC Bank, N.A. The trusts were established by the wills of Joseph E. Widener ("Mr. Widener") and Josephine Widener Bigelow ("Ms. Bigelow"), both deceased. (A2-A3). Joseph Widener died on October 26, 1943, a resident of Montgomery County, and his will dated October 29, 1942, and several codicils thereto, were probated by the Register of Wills of Montgomery County on November 12, 1943. (B2). Item Five of Widener's Will created a trust of his residuary estate, the principal of which was divided into three separate trusts, with one of those trusts itself divided into four separate trusts, one of which is held for the benefit of judgment debtor G. Eustis Paine, III, and his descendants. (B2). Item Five contains language which the Orphans' Court, Montgomery County, found was intended to create a spendthrift trust protection for the income due and owing to Mr. Paine. (B2).

Joseph Widener's daughter, Josephine Widener Bigelow, died on March 6, 1961, a resident of Palm Beach, Florida. (B2). Item XIII of Bigelow's will establishes a trust for her grandchildren, including Mr. Paine ("Bigelow Trust"). The Orphans' Court found that Item XVI also intends to create a spendthrift trust protection for the income.

During 1994, PNC Bank, in its capacity as Trustee for both the Widener and Bigelow Trusts, paid Mr. Paine, as income beneficiary, monthly distributions annually totalling more than $150,000. (B2). Since April of 1994, Mr. Paine has resided in Cabo San Lucas, Mexico, and, in that month, requested PNC Bank thereafter to pay his income distributions under both Trusts to him by wire transfer to his bank account

at Banco Nacional de Mexico. (C4). Since June of 1994, PNC Bank has complied with this directive. (C3).

On November 1, 1993, Bowne of Phoenix, Inc., filed suit against G. Eustis Paine, III, in Maricopa County Superior Court Civil Action No. CV93-24111, alleging that Bowne had provided printing services to Kachina Publications pursuant to contract, which Mr. Paine and his wife, Sally J. Paine, had personally guaranteed. On May 23, 1994, Bowne obtained a default judgment against Mr. Paine in the Superior Court of Arizona, Maricopa County, in the amount of $161,513.95. (B3).

AmerSig filed its Complaint against the Paines in Maricopa County Superior Court on January 21, 1994, alleging a breach of contract to pay for printing services valued at $391,069.26, and alleging that the Paines had personally guaranteed that contract. AmerSig also alleged that the Paines had breached a personal guarantee to repay $693,333.30 remaining on a promissory note in favor of AmerSig for $800,000.00, for a total of $1,084,402.59, plus attorneys' fees, costs, and interest. On July 8, 1994, the Superior Court entered a default judgment against G. Eustis and Sally J. Paine in the amount of one million, eighty-four thousand, four hundred and two and 59/00 ($1,084,402.59) dollars. (B3). Bowne and AmerSig domesticated their judgments in the Court of Common Pleas of Philadelphia County on August 26, 1994. (B3).

On November 8, 1994, Trustee was served by the Sheriff of Philadelphia County with writs of attachment for the Bowne and AmerSig judgments to levy against all assets of beneficiary G. Eustis Paine, III ("Mr. Paine") in its possession. (B3). Specifically, the writs sought to garnish Mr. Paine's income interests in the two trusts.

On March 5, 1996, the Orphans' Court Division issued its Decree denying Plaintiff's right to garnish the trust income due to Mr. Paine from the Widener and Bigelow trusts, and dismissing the garnishments, and Appellants filed a notice of

appeal. (B1 - B8). On December 31, 1996, The Superior Court of Pennsylvania affirmed that Decree by written opinion. (A1-A8).

Petitioners alleged in the Superior Court, Opening Brief, p. 37, the issue of Fourteenth Amendment due process violation. The Superior Court did not consider the issue because it did not appear in the statement of questions: "[t]his claim is not included in appellant's Statement of Questions Involved and, therefore is waived." (A8, fn.4). In their Petition for Review to the Pennsylvania Supreme Court, Petitioners disputed the necessity of presenting in a Statement of Questions Presented, itself merely a civil appellate docketing sheet, the particular constitutional implications of a state common law rule.

REASONS FOR GRANTING THE WRIT

In the intervening 170 years since this Court first encountered Pennsylvania's common law spendthrift trust rule, the financial, technological and industrial changes have created the opportunity for judgment debtors to relocate to foreign nations and avoid paying judgments by invoking the rule. This case involves such a trust beneficiary, adjudged indebted to two separate corporations for well over one million dollars, and whose flight to Mexico resulted in the entry of the two Arizona default judgments. Petitioners submit that the Pennsylvania Superior Court unconstitutionally expanded the traditional spendthrift trust rule to protect that debtor, and, in the process, impaired Bowne and AmerSig's contract rights in violation of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV of the U.S. Constitution.

Among other financial advancements during those 170 years, judgment debtors may now wire-transfer funds across international boundaries, a device not even invented at the time of Fisher v. Taylor, 2 Rawle 33 (1829). In this appeal, since 1994, Petitioners' particular judgment debtor has continuously transferred spendthrift trust income to Cabo San

Lucas, Mexico (C3 - C4), which nation does not even recognize Arizona judgments. The result is that the beneficiary, by taking possession of the funds for the first time outside of the United States, protects those funds at the one point in the chain of custody where creditors are allowed to attach them under the old rule. The Pennsylvania Superior Court refused to acknowledge Petitioners' constitutionally protected contract and judgment execution rights, and thereby unreasonably eliminated even that one portion of the trust income custody chain ordinarily accessible by creditors.

This litigation therefore presents an opportunity for the Supreme Court to uphold its original articulation of the constitutional permissibility of the common law spendthrift trust rule, but within the context of the sovereign interests of the United States to enforce judgments obtained within its own borders. By asserting the constitutional protections afforded domestic contracts and judgments and thereby rejecting the Pennsylvania courts' new application of the rule, this Court may affirm the old rule in a new millennial age of international travel and advanced monetary and banking technology, and the resultant challenges to sovereign interests.

In sum, the Pennsylvania Superior Court's ruling is inconsistent both with its own articulations of the traditional spendthrift trust rule and with the statements of the rule by a majority of other state courts, along with the well-reasoned academic literature on the subject. Petitioners submit that it is vital that this Court take jurisdiction of this appeal in order to assert the preeminence of the constitutional protections of judgment creditor rights over those of truly spendthrift beneficiaries or their testators, whose control of funds after their demise can lead, as in this case, to judicial intrusion into legitimately protected creditor rights.

Finally, because the spendthrift trust rule originated in the State of Pennsylvania, this appeal enhances the pursuit of those objectives by casting these issues in the state jurisdiction with the longest, and perhaps most indepth, judicial experience with the original spendthrift trust rule.

I

Certiorari Should Be Granted Because the Pennsylvania Supreme Court Has Applied Its Common Law Spendthrift Trust Rule In a Manner Which Extinguishes the Judgment and Contract Rights of the Petitioners, In Disregard of Their Fourteenth Amendment Rights and Article IV Privileges and Immunities, and In Contrast to the Interpretation of the Rule in the Majority of State Jurisdictions.

A. Bowne and AmerSig Possess Contract and Judgment Enforcement Rights, Which Enjoy Constitutional Protections.

Bowne and AmerSig advance their contract and judgment enforcement rights as the constitutionally protected rights they deem impermissibly impaired by the Pennsylvania appellate courts' affirmances of the trial court's quash of Bowne and AmerSig's writ of garnishment. The trial court utilized an interpretation of the spendthrift trust rule which completely voided those rights,[2] and in doing so, improperly infringed the creditors' due process rights.[3]

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[2] In determining the allowable constitutional limits of the spendthrift trust rule, along with the U.S. Supreme Court's prior acceptance of the rule, it is essential to understand the three points of potential interception by creditors of beneficiary income from a spendthrift trust: (1) while in the possession of the trustee prior to disbursement; (2) while in transit to the beneficiary after leaving the possession of the trustee, but before it reaches the beneficiary; and (3) after the beneficiary receives the income. Under the traditional understanding of the rule, only in the last instance, after the income reaches the beneficiary, may the creditors attach it.

[3] This Court has previously reviewed and approved expansions to the exceptions of the spendthrift trust rule. See Boggs v. Boggs, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997) ("a beneficiary's interest in a spendthrift trust, despite otherwise applicable protections, can be reached in the

This Court has determined that the U.S. Constitution guarantees due process before any law may impair contract rights. Under established Supreme Court precedent, and for purposes of the Fourteenth Amendment Due Process clause, "property" is defined sufficiently broadly to include rights which at common law are deemed contractual. Arnett v. Kennedy, 416 U.S. 134, 135, 94 S.Ct. 1633, 1635, 40 L.Ed.2d 15 (1974); Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970). Specifically, the U.S. Supreme Court has held that:

> Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened.

Lynch v. United States, 292 U.S. 571, 580 (1934). Further, this Court has ruled that:

> Congress has no general power to regulate and control the kind, quality, amount, production, or prices of all property. Contract obligations, including obligations to pay money, have always been recognized to be property within the meaning of this rule.

Perry v. United States, 294 U. S. 330, 336 (1935).

Additionally, the federal courts have held that judgment creditors such as the Petitioners possess constitutional rights to enforce their judgments:

> It is the intent of the law to grant citizens the privilege to collect any final money judgment, unless stayed.

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context of divorce and separation"); and Patterson v. Shumate, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992) ("[c]onstruing 'applicable nonbankruptcy law' to include federal law ensures that the security of a debtor's pensions benefits will be governed by ERISA, not left to the vagaries of state spendthrift trust law").

> [. . . .] For the law to operate otherwise would violate the constitutional rights of all judgment creditors, for this is a traditional historical right which this court considers to be one of the privileges of a citizen of the United States, guaranteed by Article IV, Section 2, of the Constitution.

Dorey v. Dorey, 77 F.R.D. 721, 722 (N.D. Ala. 1978). Petitioners submit that the Pennsylvania Superior Court has departed from the rule's historic operation, and, thereby has expanded the rule in a constitutionally impermissible manner.

In this instance, the Commonwealth of Pennsylvania has no interest in protecting debtors who absent themselves from the United States to a foreign sovereignty and, in the process, avoid attachment by United States creditors pursuant to judments totalling over one million dollars, originating in Arizona. While there may be traditional state interests found in the traditional operation of the rule, which consist of protecting the donor's wishes, this case represents no intrusion upon that historical understanding of the rule.

Accordingly, when the Pennsylvania Supreme Court refused to grant review and reverse the Superior Court's application of the rule, it departed from the traditional and constitutionally permissible impairment of creditor contract and judgment enforcement rights, and broadened the rule so as now to result in the protection of judgment debtors who possess the resources and savvy to relocate to foreign countries and to wire-transfer funds across international borders. The result is that a traditionally limited rule of protection of trust income from the time of its disbursement until it reaches the beneficiary, by the fact of the transnational relocation of the debtor, now has become a complete bar to enforcement of creditors' contract and judgment rights.

B. The Lower Courts' Rigid Interpretations of the Spendthrift Trust Rule Violate the Fourteenth Amendment and the Article IV Protections of Contractual and Judgment Enforcement Rights.

1. In this Case, the Pennsylvania Courts Improperly Expanded the U.S. Supreme Court's Earlier Defense of the Rule Based Upon the Foreseeability of Its Asset Shield.

Bowne and AmerSig obtained contractual rights to garnish any funds in the possession of the Paines, which the lower court did not recognize or even compare with the property rights of Widener and Bigelow. If the Paines fled the country, Bowne and AmerSig clearly retained the right to attach any property remaining in the United States. The Pennsylvania Superior Court unreasonably required Bowne and AmerSig, in their financial dealings with beneficiary Eustis Paine, to do the impossible, namely foresee PNC Bank's wire transfers of spendthrift trust income to a Mexican bank, a process designed or otherwise reasonably anticipated to frustrate collection efforts. This inability to foresee wire transfers and the Pennsylvania courts' expanded applications of the rule prevent Petitioners from enforcing their rights against those funds. It was not reasonable to require Bowne and AmerSig to anticipate that enforcing a U.S. judgment against Mr. Paine would require filing a lawsuit in Mexico, while hoping that Mr. Paine would not flee that jurisdiction also after Bowne and AmerSig again prevailed. Yet this is the resolution which the Pennsylvania Superior Court deemed just, and overwhelmingly so. Bowne and AmerSig submit that the Fourteenth Amendment does not countenance such an outcome.

In two nineteenth century opinions, the U.S. Supreme Court found the common law spendthrift trust rule constitutionally permissible because "such a provision [was not] contrary to the policy of the law, or to any act of

assembly." Fisher v. Taylor, 2 Rawle 33, 37 (1829). Additionally, this Court wrote in Fisher that "[c]reditors cannot complain, because they are bound to know the foundation upon which they extend their credit." Fisher, supra. This Court ruled in accord with the Fisher decision in its opinion in Nichols v. Eaton, 91 U.S. 716, 23 L.Ed. 254, 1 Otto 716 (1875), when the Court stated:

> [S]ince the creditor knows, when he parts with consideration of his debt, that the property so exempt can never be made liable to its payment, he is neither defrauded nor injured by the application of the law to his case. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment.

Nichols v. Eaton, 91 U.S. at 726. Hence, this Court announced the foreseeability of the spendthrift trust shield as the rationale for excluding the trust assets from recoverable property. The Pennsylvania courts expanded the rule beyond the forseeability of the nature of the assets to encompass the forseeability of the nature of the beneficiary's conduct. Petitioners submit that this is an unconstitutional expansion of the spendthrift trust rule, since the Petitioners certainly had a right to look to the trust income for payment of Mr. Paine's debts once he took possession of it.

2. The Unforeseeability of Mr. Paine's Violation of the Covenants of Good Faith And Fair Dealing Implicit In His Contracts with Petitioners Prevents PNC Bank From Invoking The Spendthrift Trust Rule.

a. All Contracts Contain Implied Covenants of Good Faith and Fair Dealing.

The Paines have obligations not to interfere with collection efforts as a result of their implied covenants of good faith and fair dealing subsumed in their guaranties. See Norton v. Steinfeld, 36 Ariz. 536, 288 P. 3 (1930). The implied covenant of good faith and fair dealing exists in every contract in Pennsylvania.[4] Liavis v. Kosta, Inc., 421 Pa.Super. 502, 618 A.2d 450 (1992). Arizona, the state in which the contracts and personal guarantees were executed, concurs: "The law implied a covenant of good faith and fair dealing in every contract." Rawlings v. Apodaca, 151 Ariz. 149, 153-154, 726 P.2d 565 (1986), en banc; citing the following: Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 383, 710 P.2d 1025, 1038 (1985); Restatement

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[4]There was clearly evidence before the Orphans' Court that Paine and his companies had entered into contracts and that such were the basis for the complaints in Arizona and the subsequent default judgments. In the immediate case, the evidence of the existence of underlying contracts include the following portions of the lower court Reproduced Record: 1) the default judgments themselves, wherein the Maricopa County Courts found for both Bowne and Amersig contractual entitlements to attorneys' fees and costs (RR 3a-5a); 2) the docket sheets attached to the certified and exemplified judgments, which refer to complaints filed upon contracts and upon "account (open/stated)" (RR 6a-8a); and 3) Bowne and Amersig's Petition to Strike the Exemption asserted by PNC Bank (RR 14a-18a). Accordingly, in documents well within the Orphans' Court's power to consider, it is clear that the judgments were awarded upon contracts, and therefore the doctrine of the covenant of good faith and fair dealing implicit in all contracts is applicable.

(Second) of Contracts § 205 (1981); and 5 Williston on Contracts, § 670 at 159 (3rd Ed., Jaeger Ed. 1961).

b. Mr. Paine's Wire Transfers Violate the Covenant of Good Faith and Fair Dealing and Thereby Exceed the Allowable and Foreseeable Boundaries of the Spendthrift Trust Rule's Policies and Protections.

Under Pennsylvania law, a requirement of good faith has been imposed under a contract doctrine developed called "The Doctrine of Necessary Implication." Frickert v. Deiter Bros. Fuel Co., Inc., 464 Pa. 596, 347 A.2d 701 (1975) (Pomorey, J. concurring); Slater v. Pearle Vision Center, Inc., 376 Pa.Super. 580, 546 A.2d 676 (1988). That Doctrine provides:

> "The law is clear that "[i]n the absence of an express provision, the law will simply imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's rights to receive the fruits of the contract."

Frickert, 464 Pa. at 603, citing D.B. Van Campen Corp. v. Building and Const. Trades Counsel of Phila., 202 Pa.Super. 118, 195 A.2d 134, 136 (1963). "The conduct of virtually any party to any contract accordingly may be vulnerable to claims of breach stemming from this obligation [footnote omitted]." Steven J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith," 94 Harv.L. Rev. 369 (1980). Finally, the Restatement (Second) of Contracts, § 205, Chapter 9, states: "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement," with Comment D,

"Good faith performance," concluding: "[s]ubterfuges and evasions violate the obligation of good faith and performance even though the actor believes his conduct to be justified." See Prudential Insurance Co. of America v. Van Matre, 511 N.E.2d 740, 746, 158 Ill.App.3d 298 (5th Dist. 1987).

Mr. Paine was bound by this covenant by virtue of his contracts with Petitioners. The Pennsylvania Supreme Court is at odds with jurisdictions across the United States first by failing to enforce that covenant, and then by enforcing the spendthrift trust rule in violation of established common law contractual policies.

The U.S. Supreme Court has conditioned the powers of spendthrift trust protections upon the requirement that the operation of the trust not be "contrary to law or public policy." Nichols, 91 U.S. at 726. The Pennsylvania Supreme Court has upheld spendthrift trust provisions "unless they contravene some positive rule of law or are against public policy." In re Moorehead's Estate, 289 Pa. 542, 551, 137 A. 802, 806 (1927) (emphasis added), quoted approvingly in Shelley v. Shelley, 223 Or. 328, 335-336, 354 P.2d 282, 285-286 (1960) ("the privilege of disposing of property is not absolute: it is hedged with various restrictions where there are policy considerations warranting the limitation"). The courts of California similarly base the enforceability of the spendthrift trust rule upon its adherence to accepted public policy: "[a]s in Bridge v. Kedon, [163 Cal. 493, 126 P. 149 (1912)], it is there recognized that the question of the application of these [spendthrift trust] principles in a particular situation is one of policy." Kelly v. Kelly, 11 Cal.2d 356, 365, 79 P.2d 1059, 1066 (1938).[5]

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[5] The Ohio Court of Appeals similarly held that "[i]n this state no man can have money in absolute ownership, and still deny his creditors. If it were in his possession and hidden, he might bid them defiance; but that would be, not because there was no law to reach him, but in spite of it." Kruse v. Baeder, 1 Ohio Dec. 283, 285 (1894).

It is well recognized that the covenant of good faith and fair dealing is an important public policy. See, e.g., A.C. Shaw Construction, Inc. v. Washoe County, 105 Nev. 913, 915, 784 P.2d 9, 10 (1989) ("[I]n our view, sound public policy warrants recognition of the covenant of good faith and fair dealing"). In particular, the efforts by PNC Bank and Mr. Paine violate all notions of fair play, and therefore are unforeseeable as a matter of law:

> It is uniformly held to be against public policy to permit a person to tie up his own property in such a way that he can still enjoy it but can prevent his creditors from reaching it. [. . .] We hold that the garnishment of the [spendthrift] trustee was valid and effective.

First National Bank of Omaha v. First Cadco Corp., 189 Neb. 734, 205 N.W.2d 115, 118 (1973) (emphasis supplied).

3. Accordingly, Petitioners' Request for Relief Is Consistent With the Reasoning In the Supreme Court's Prior Interpretations of the Spendthrift Trust Rule, and With the Interpretations of State Jurisdictions Throughout the Nation.

In this case, AmerSig and Bowne did not request that the Pennsylvania Supreme Court lift the shield of the assets under the ordinary assumptions of the rule. Petitioners do not claim that the shield of the assets was unforeseeable if Mr. Paine received those assets for the first time in the United States. Petitioners contend that the conduct of the judgment debtor-beneficiary, in removing himself from the United States and taking possession of the trust income outside the borders of the United States, and not the nature of the assets, was unforeseeable. The unforeseeability of such an outcome is enforced by the understanding of the Pennsylvania, and

other, courts, interpreting and enforcing the spendthrift trust rule.

C. The Pennsylvania Superior Court Below Impermissibly Allowed the Conversion of the Spendthrift Trust Defense Into an Absolute Bar To Execution Against Trust Distributions By Judgment Creditors, and Thereby Impaired the Contract Rights of AmerSig and Bowne.

1. The Traditional Rule Assumes that Opportunities of Collection Upon the Trust Income Remain to Judgment Creditors.

The Pennsylvania courts' decisions below were not only inconsistent with other jurisdictions applying the rule, but the lower courts' impermissible expansion of the rule was inconsistent with established precedent in Pennsylvania. The Pennsylvania Supreme Court's decision in Board of Charities v. Lockhard, explained that the courts expected creditors to retain some degree of opportunity for attachment of trust income once in the possession of the beneficiary.

Specifically, the Pennsylvania Supreme Court previously held:

> If the fund had been attached after coming under the control of the legatee, the action of the court below would have been entirely justified. But the difficulty is that the fund was attached before it was within the control of the beneficiary, and while it was yet in the hands of the trustee.
>
> * * * *
>
> In this case, the pressure was prematurely applied. There are methods of reaching the beneficiary directly.

Board of Charities and Corrections of City of Philadelphia v. Lockard, et al., 198 Pa. 572, 574, 48 A. 496, 498 (1901). It was precisely because there were alternative methods of attachment available to the creditor against the beneficiary that the Pennsylvania Supreme Court found it premature to attach the funds in the possession of the trustee. Despite Bowne and AmerSig's extensive discussion and reliance upon the Board of Charities and Corrections decision, the Superior Court did not even refer to the opinion in their Memorandum Opinion.

Other Pennsylvania cases are in concert with an assumption that creditors retain other avenues of attachment besides those against the trustee. The Supreme Court of Pennsylvania allowed a spendthrift trust legacy to pass in transit without attachment, but limited the creditor restraints: "[a]fter it reaches the hands of the [beneficiary] children it becomes their property absolutely, and liable to all the incidents of property among which is that of execution and attachment." In Re Goe's Estate, 146 Pa. 431, 433-34, 23 A. 383 (1892).

An Ohio appellate court, in Kruse v. Baeder, 1 Ohio Dec. 283 (1894), reviewed the early Pennsylvania common law of spendthrift trusts and explained the limited protection enjoyed by beneficiaries, and the balance that is established between the rights of the testator and those of third parties, such as creditors of the income beneficiary. The Kruse decision explains that a balance between competing rights is established within the spendthrift trust rule by eliminating the protection of the trust income once in the possession of the beneficiary. Kruse, 1 Ohio Dec. at 284-5.[6] Hence, the very

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[6] Citing Pennsylvania law, California common law concurs on the issue:

> But it is everywhere agreed that after the beneficiary has actually received the trust property his creditors may reach it and he may dispose of it as he wishes. Beck's Estate, supra; Goe's Estate, supra;

root of the Pennsylvania spendthrift trust defense assumes that creditors retain an opportunity to attach the funds in the hands of the beneficiary, and no subsequent Pennsylvania decisions overrule this most basic premise.

Other sources of law on the subject make the point clear. The Second Restatement of Trusts states:

> j. Income paid to beneficiary. After the income of a spendthrift trust has been paid to the beneficiary it can be transferred by him and can be reached by creditors.

Restatement (Second) of Trusts, Ch. 6, "Transfer of Interest," § 152. Perhaps the most noteworthy scholar and critic of spendthrift trusts, Erwin N. Griswold, argues that the availability of alternative collection options by the creditor is central to the law's tolerance of such spendthrift trust protections of the beneficiary. Erwin N. Griswold, "Reaching the Interest of the Beneficiary of a Spendthrift Trust," 43 Harv.L.Rev. 63, 84 (1929). Hence, throughout the common law and legal scholarship, there has existed an assumption that, while spendthrift trust income is protected in the possession of the trustee, creditors of the beneficiary retain a

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Board of Charities & Corrections of City of Philadelphia v. Lockhard, 198 Pa. 572, 574, 48 A. 496, 82 Am.St.Rep. 817; 1 Bogert, Trusts and Trustees, p. 717, § 222; 43 Harvard Law Rev. 84; 22 Cal.Law Rev. 492; 21 Cal.Law Rev. 143.

Kelly v. Kelly, 11 Cal.2d 356, 362, 79 P.2d 1059, 1063 (1938). This presumption of alternative avenues of redress for creditors is an accurate statement of California law on the subject: "[o]f course, after each installment of income has been paid to the beneficiary, the creditor may take the normal steps to reach that property in the hands of his debtor." Everett J. Brown, Jr., Comment, Rights of Creditors of Beneficiary of Spendthrift Trust, 21 Cal.L.Rev. 142, 143 (1933). Accordingly, rights of alienability by the income beneficiary make the income "accessible to the claims of creditors." Campbell v. Foster, 35 N.Y. 360, 370 (1866).

right to enforce their judgments by attaching the income in the possession of the beneficiary.

2. Collection Upon the Judgments Against Mr. Paine Are Now a Practical, if Not Legal, Impossibility.

In this case, PNC Bank categorically has eliminated the rights of Bowne and AmerSig to enforce their judgments in the foreign national jurisdiction to which PNC Bank has transferred the income. Mr. Paine now resides in Mexico, and probably will continue to do so for as long as any creditors in the United States continue to exercise their legal rights to satisfy their judgments. Such residence almost entirely eliminates the enforceability of Bowne and AmerSig's Arizona judgments:

> Many states, including New Mexico and Texas, have adopted the "Uniform Enforcement of Foreign Money-Judgments Recognition Act." . . . Arizona, however, has not adopted this Act. . . . there is no formal agreement between Arizona and its cross-border neighbor, Sonora, Mexico, setting forth a procedure to recognize each other's judgments. Furthermore, there is no treaty between the United States and Mexico providing for a simple mechanism to register a cross-border judgment.

David W. Kash, "Enforcement of Judgments Across the Border with Mexico," Arizona Attorney, July 1995, p. 11, 13. As a legal matter, Bowne and AmerSig's Judgments cannot support an attachment of Mr. Paine's personal property in Mexico.

3. Such an Absence of Remedies Violates the Article IV Privileges and Immunities Held by Petitioners as Judgment Creditors.

Bowne and Amersig possess privileges and immunities to enforce their money judgments, which the Pennsylvania courts below disparaged to the point of essentially voiding in a practical, if not legal, sense. The decision of Dorey, supra, at 723, is instructive on this point:

> It is the opinion of this court that it is still a constitutional right of a judgment creditor, when no stay has been issued pursuant to law, to collect his judgment. This must be true regardless whether the judgment debtor moves his residence, whether before or after judgment.
>
> [****]
>
> The question is whether the defendant can obtain a super-right as compared with residents of this district by changing his residence to another district. If he had remained a resident of this district, he would be subject to levy of execution on the judgment, since it has not been superseded or otherwise stayed. His wages would be subject to garnishment. His other property would be subject to legal process.
>
> [****]
>
> Is it reasonably to be assumed that the law would prevent the judgment creditor from executing on his judgment simply because the judgment debtor has changed his residence to another district? This court thinks not. To so hold would, in fact, give more rights to a resident of a foreign district than to one of this district. To so construe the statute would clearly create a disparity in rights that would constitute a

> denial of the equal protection of the laws to residents of the judgment district. Those who live here and suffer judgments here must pay those judgments, or at least remain subject to execution of them, if they do not supersede them while the case is on appeal, or otherwise obtain a stay. Nonresidents of the district, on the other hand, can postpone the effect of the judgment without a supersedeas bond or otherwise obtaining a stay simply by appealing the case, even in bad faith.
>
> [****]
>
> To allow this defendant to obtain an automatic stay by simply moving across the district line would amount to an injustice of such enormity as to offend the conscience of this court.

Dorey, supra. at 723. Bowne and Amersig present a case in point of the inequities of a judgment debtor removing himself from a jurisdiction in order to avoid collection, but in this case, protecting his assets left behind by invoking the law of that jurisdiction.

Bowne and AmerSig respectfully submit that, in keeping with the principles enunciated in Dorey, supra, had Mr. Paine remained in either the states of Arizona or Pennsylvania and thereby allowed the possibility of attachment of the funds, he would retain an entitlement to the protections of the spendthrift trust rule. Instead, by directing that PNC Bank wire-transfer the funds to a destination in Mexico, Mr. Paine has converted the limited spendthrift trust protections for income in the trustee's possession, or in transit to the beneficiary, into an absolute bar against attachment by creditor garnishors. This Court should rule, accordingly, that Mr. Paine has relinquished his entitlement to the protections of the spendthrift trust rule by making impossible the alternative means of collection which the rule assumes. Bowne and AmerSig respectfully submit that this Court should permit garnishment of PNC Bank for the trust income.

D. There Exist No Countervailing Constitutional Considerations To Protect The Spendthrift Trust Income In The Immediate Case.

The constitutional protections due the contract and judgment rights of Bowne and Amersig should trump those of Mr. Widener, Ms. Bigelow or Mr. Paine. It is clear that the constitutional protections of due process should not apply to persons already deceased. Dean Griswold stated in "Reaching the Interest of the Beneficiary of a Spendthrift Trust," 43 Harv.L.Rev. 63, at Page 96:

> It cannot be said that the statute deprives the settlor of his property without due process of law. He certainly has no interest in the property subject to constitutional protection after he had died; and even if he be still alive he cannot claim constitutional protection for property of which he has completely disposed. Nor can it be said that the beneficiary is deprived of his property without due process of law; to compel a man to apply his property to the payment of debts is not to deprive him of his property within the meaning of the Constitution.

While the Pennsylvania Supreme Court in In Re Borsch's Estate, 362 Pa. 576, 67 A.2d 119 (1949), disagreed with that conclusion in part, it conceded that the comparison must be made with the rights of Josephine Bigelow and Joseph Widener while still alive, and, therefore, while those expectations of gifting to Mr. Paine were as yet inchoate. Even the Borsch's Estate majority conceded that "there are no pockets in shrouds." Borsch's Estate, 362 Pa. at 586, 67 A.2d at 121.

Bowne and AmerSig have provided over one million dollars in services and goods to a beneficiary who has fled the country, in comparison with two testators who will suffer no injury from the present attachment, and who would have

suffered only an incursion upon inchoate rights. Accordingly, the testators' rights pale in comparison to the rights of Bowne and AmerSig, and Petitioners demonstrate clearly greater injury from the application of the rule in this case.

E. The Attempt by PNC Bank and Mr. Paine to Utilize International Borders to Convert the Spendthrift Trust Rule Into an Absolute Bar to Collection Calls for Limitations Upon the Pennsylvania Courts' Attempts to Extend the Rule's Protections.

The assumptions and exceptions to the rule should have meaning, as opposed to an improperly formalistic approach announced in the case below by the Pennsylvania Superior Court. This Supreme Court has so stated:

> The whole cluster of vexatious problems arising from uses and trusts, mortmain, the rule against perpetuities and testamentary directions for accumulations or for suspensions of the power of alienation, is one whose history admonishes against unnecessary rigidity.

Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 64, S.Ct. 384, 391, 88 L.Ed. 526 (1944). The Pennsylvania courts' rigid application of the rule, while seemingly a strict application of its terms, actually enlarges its scope by enforcing it within contexts never intended by its original protagonists.

The traditional respect given to rules of property created prior to the present context of computer-generated international wire transfers and the speed and ease of international travel call for serious re-evaluation of any unyielding enforcement of the spendthrift trust rule. As the Delaware Chancery Court stated, in an opinion affirmed by the Delaware Supreme Court:

> There is no doubt but that innumerable trusts have been upheld on the basis of the dogmatic principle

> above cited ["*cujus est dare ejus est disponere*" - so long as a donor violates no law in making a gift he may condition his bounty as suits himself], however, such rule clearly has no general application in the world of today in the light of numerous other rules which control and limit the power to make gifts, and I fail to see any logical reason why the legislature may not by the adoption of such a statute as § 3536(b) validly permit the alienation of property under its provisions notwithstanding the donor's original purpose.

Wilmington Trust Company v. Carpenter, 39 Del. Ch. 314, 319-320, 163 A.2d 578, 581 (1960), aff'd Wilmington Trust Company v. Carpenter, 39 Del. Ch. 528, 168 A.2d 306 (1961). The Wilmington Trust decision speaks directly to the circumstances here, where the overly formalistic approach of the Pennsylvania Superior Court is inconsistent with creditors' needs to be protected against loss of property in an age of instant communication and instant wire transfers. Hence, this Court actually may affirm the traditional spendthrift rule's vitality by not applying it in the circumstances at bar here.

II

Certiorari Should be Granted Because the Pennsylvania Supreme Court Has Denied Petitioners the Opportunity to Obtain a Continuing lien on the Trust Income While in the Possession of Trustee PNC Bank as the Income Becomes Due and Payable, Which Denial Independently Extinguishes the Judgment and Contract Rights of the Petitioners In Disregard of Their Fourteenth Amendment Rights and Article IV Privileges and Immunities.

A. Bowne and AmerSig Submit that a Continuing Garnishment is Necessary to Remedy the Uncertain Nature of Mr. Paine's Distributions.

Bowne and AmerSig require a garnishment of a continuing nature in order to make their garnishments effective. Such a continuing garnishment is appropriate given the rule in Pennsylvania that Mr. Paine's interest in his unaccumulated trust income has already vested and has become available for attachment at the specific time it accrues. In re Riverside Trust Co. v. Twitchell, 342 Pa. 558, 20 A.2d 768, 771 (1941); in accord Fico v. Ghingher, III, 287 Md. 150, 160-61, 411 A.2d 430, 436-37 (App. 1980). Also in accord, In Re Lyons, 148 B.R. 88, 94 (D.C. 1992) ("Outside bankruptcy, a federal tax lien may attach to a taxpayer's vested right, under a trust or contract, to receive periodic payments or distributions of property then due or that will become due in the future," considering a spendthrift trust and citing In Re Robinson, 39 B.R. 47 (Bankr.E.D.Va. 1984)); Gilbert v. Gilbert, 447 So.2d 299, 302 (Fla.App. 1984) ("The husband also complains of that portion of the order representing a continuing writ of garnishment to pay future alimony. [* * *] The remedy is drastic but appropriate to cope with the husband's misconduct.") (emphasis added). Accordingly, PNC Bank cannot contest the vested nature of Mr. Paine's interest. Consequently, a continuing lien should be available to Bowne and AmerSig.

B. Mr. Paine's Wire Transfers Require a Continuing Garnishment for Bowne and Amersig to Collect Their Judgments.

In the instant case, if Bowne and Amersig received the right to garnish Mr. Paine's trust income, PNC Bank could conceivably schedule the wire transfers either frequently enough or at particularized periods of the day in order to defeat the possibility of garnishment. Because a rigid interpretation of the garnishment statutes would lead to an unjust result, similar to a rigid enforcement of the spendthrift trust rule, Bowne and AmerSig are entitled to specifically tailored relief from the Court. Without such specifically tailored relief, Bowne and AmerSig would possess a right without a meaningful remedy, which again constitutes an impermissible restraint upon their rights to enforce their money judgments: "An interpretation of a statute leading to consequences which are anomalous, impossible or incapable of execution will, if possible, be rejected." Null v. Staiger, 333 Pa. 370, 375, 4 A.2d 883, 885 (1939). Bowne and Amersig respectfully submit that the Court should grant review in this case in order to confront and resolve the remedial and constitutional challenges posed by the Pennsylvania Superior Court's expansion of the spendthrift trust rule, and the Pennsylvania Supreme Court's adoption of that rule.

CONCLUSION

For the foregoing reasons, Petitioners Bowne of Phoenix, Inc., and AmerSig Graphics, Inc., respectfully pray that the Court issue a writ of certiorari to review the judgment of the Pennsylvania Supreme Court and Superior Court.

Respectfully submitted,

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APPENDIX

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ESTATE OF JOSEPH E. WIDENER, SUR TRUST FOR BENEFIT OF G. EUSTIS PAINE, III

***

ESTATE OF JOSEPHINE WIDENER BIGELOW, DECEASED SUR TRUST FOR BENEFIT OF G. EUSTIS PAINE,III

APPEAL OF: AMERSIG GRAPHICS, INC., AND BOWNE OF PHOENIX,INC.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 01355 Philadelphia 1996

Appeal from the Order entered
March 5, 1996
in the Court of Common Pleas of
Montgomery, County,
Orphans No. 49539, 63924

BEFORE: CIRILLO, P.J.E., and SAYLOR and HOFFMAN, JJ.

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Montgomery County be, and the same is hereby affirmed.

BY THE COURT:

PROTHONOTARY

Dated: December 31, 1996

ESTATE OF JOSEPH E. WIDENER, SUR TRUST FOR BENEFIT OF G. EUSTIS PAINE, III

***

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BEFORE: CIRILLO, P.J.E., and SAYLOR and HOFFMAN, JJ.

MEMORANDUM:

This is an appeal from an order of the Court of Common Pleas of Montgomery County, Orphans' Court Division, dismissing appellants' writ to garnish the income interest of G. Eutis Paine, III, in two spendthrift trusts. We affirm.

The parties to this action agreed to a joint stipulation as to all pertinent facts, allowing the Orphans' Court, the Honorable Stanley R. Ott presiding, to consider the case on briefs and argument. The joint stipulation, filed January 10, 1996, established that G. Eustis Paine, III is the beneficiary of the Trust of Joseph E. Widener, deceased, and the Trust of

Josephine Widener Bigelow, deceased.[1] Paine has been residing in Cabo San Lucas, Mexico since April of 1994, and receives income distributions under both trusts through international wire transfer to the Banco Nacional de Mexico.

On May 23, 1994 appellant Bowne of Phoenix, Inc. obtained a default judgment in the Superior Court of Arizona, Maricopa County, against G. Eustis Paine, III in the amount of $161,513.95. On July 8, 1994 appellant AmerSig Graphics, Inc. obtained a default judgment against Paine in the same court in the amount of $1,084,402.59.

Appellants domesticated their judgments in the Court of Common Pleas of Philadelphia County on August 26, 1994 and soon after filed writs of attachment for their respective judgments to levy against all of Paine's assets in the possession of PNC Bank, N.A. (PNC). Specifically, the appellants sought to garnish Paine's income interests in both the Widener trust and the Bigelow trust, for which PNC served as trustee. On November 8, 1994 PNC was served by the sheriff of Philadelphia County with the writs of attachment for the appellants' judgments.

The garnishment actions were consolidated and transferred to the Orphans' Court Division of the Court of Common Pleas of Montgomery County, which had jurisdiction over both trusts. Based upon the joint stipulation, the parties' briefs, and arguments, Judge Ott determined that both trusts contained spendthrift clauses which rendered any income generated on Paine's behalf unattachable until it was in Paine's possession. Judge Ott, therefore, dismissed the writs. This appeal followed.

Appellants present two issues for our consideration:

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[1] Copies of the wills and codicils creating the respective trusts are incorporated in the joint stipulation.

> (1) Whether the trial court erred in determining that Appellants could not garnish the income deriving from the Widener and Bigelow trusts intended for G. Eustis Paine, III, while that income was in the possession of trustee, PNC?
>
> (2) If the trial court did err, whether appellants are entitled to a continuing lien on the income derived from the Widener and Bigelow trusts, or must they demand the income when it becomes due and owing to Paine?

When reviewing a final order of the Orphans' Court, we must confer the same weight and effect to the findings of the presiding judge as we would to a jury verdict. In re Fleigle, 444 Pa. Super. 632, 664 A.2d 61 (1995) (citations omitted). It is the law of this Commonwealth that:

> [W]e will not disturb those findings absent manifest error; as an appellate court we can modify an Orphans' Court decree only if the findings upon which the decree rests are not supported by competent or adequate evidence or if there has been an error of law, an abuse of discretion or a capricious disbelief of competent evidence.

In re Benson, 419 Pa. Super. 582, 585, 615 A.2d 792, 793 (1992).

Both wills creating the trusts in question contain express spendthrift provisions directing that the principal or income cannot be alienated, anticipated, or encumbered by the beneficiary, nor may it be "subject to attachment, execution,

sequestration, or to any order of court."[2] The law of spendthrift trusts is well established in this Commonwealth. A spendthrift trust exists whenever the document creating the trust contains an express provision forbidding anticipatory alienation or attachment by creditors of a beneficiary. Riverside Trust Co. v. Twitchell, 342 Pa. 558, 20 A.2d 768 (1941) (citing Keeler's Estate, 334 Pa. 225, 3 A.2d 413 (1939)). Furthermore, a spendthrift trust is a valid means of protecting a trust estate, both principal and income, from creditors of a beneficiary. Sproul-Bolton v. Sproul-Bolton, 383 Pa. 85, 117 A.2d 688 (1955). The safeguard created by a spendthrift provision arises solely from the principle that, in the absence of statutory language to the contrary, a settlor can dispose of his/her property as he/she deems appropriate. Benson, supra. The income generated by the trust corpus remains the property of the settlor until it is actually paid to the beneficiary. Riverside Trust Co., supra; see also Fox's Estate, 264 Pa. 478, 107 A. 863 (1919) (noting that the income from a spendthrift trust remains the property of the testator until it is actually paid to the beneficiary); Goe's Estate, 146 Pa. 431, 23 A. 383 (1892) (stating that a bequest under a will is protected by spendthrift clause while it is in transit from executor to legatee); Restatement of Trusts Second § 152 comment h ("[a] spendthrift trust protects income which has been received by the trustee but has not been paid by him to the beneficiary.").

In Morgan's Estate, 223 Pa. 228, 72 A. 498 (1909), the Pennsylvania Supreme Court stated:

> The law rests its protection of what is known as a spendthrift trust fundamentally on the principle of cujus est dare, cujus est dispondere. It allows the donor to condition his bounty as suits himself so long as he violates no law in so doing. When a trust of

[2] All parties concede that the Widener and Bigelow trusts are classic spendthrift trusts.

> this kind has been created, the law holds that the donor has an individual right of property in the execution of the trust; and to deprive him of it would be a fraud on his generosity. For the law to appropriate a gift to a person not intended would be an invasion of the donor's private dominion.

Morgan's Estate, 233 Pa. at 230, 72 A. at 499.

Appellants' initial contention is that spendthrift trust law protects income in the hands of the trustee and in transit to the beneficiary only where "the creditor has an opportunity to garnish the income in the possession of the beneficiary after its receipt from the trustee." Appellants then state that because Paine resides in Mexico, they have "no alternate methods of attachment," and therefore the protections normally afforded spendthrift trusts do not apply in this case. Despite its creativity, this argument has no basis in law or fact.[3]

Appellants' perceived inability to attach Paine's assets has absolutely no relation to the protection this Commonwealth has long afforded spendthrift trusts. Rather, it is the rights of the donor to distribute his/her estate with which the law is concerned. Morgan's Estate, supra. Therefore, this argument must fail.

Appellants next contend that their writs to garnish the Widener and Bigelow spendthrift trusts should have been granted because the operation of the trusts is "repugnant to public policy." This argument is also meritless.

---

[3] Appellants cite to numerous authorities from several jurisdictions, none of which support their proposition that creditors are able to avoid the normal protections afforded to spendthrift trusts if they are unable to reach the debtor's assets through "normal" channels.

Appellants cite Moorehead's Estate, 289 Pa. 542, 137 A. 802 (1927), to support the theory that the spendthrift clauses in the Widener and Bigelow trusts should be avoided because they are against public policy. Moorehead's Estate, however, is easily distinguishable from the present situation and, therefore, has no application. There, a spendthrift clause was circumvented in order to allow for support payments to a wife who was deserted by her husband, the beneficiary of the trust. The court placed special significance on the family relationship in its opinion, stating, "marriage is a social institution, publici juris, being the foundation of the family and the origin of domestic relations of the utmost importance to civilization and social progress; hence the State is deeply concerned in its maintenance in purity and integrity." Moorehead's Estate, 289 Pa. at 552, 137 A. at _ (quotations omitted)[page omission in original].

The "support exception" referred to in Moorehead's Estate is a narrow one, and no such exception exists for creditors seeking to invade a spendthrift trust to satisfy a debt. See 20 Pa.C.S.A. § 6112 ("[i]ncome of a trust subject to spendthrift . . . provisions shall nevertheless be liable for the support of anyone whom the income beneficiary shall be under a legal duty to support"); Posner v. Sheridan, 451 Pa. 51, 299 A.2d 309 (1973) (recognizing a common law right of a wife to recover support against a spendthrift trust); Morton v. Morton, 394 Pa. 402, 147 A.2d 150 (1959) (spendthrift clause of trust ineffective against wife's claims for support); Stewart's Estate, 334 Pa. 356, 5 A.2d 910 (1939) (wife may recover support against trust as if no spendthrift clause existed)

The only reference the Moorehead court makes to creditors or debtors is to state that the will creating the trust in question "surrounded the trust with restrictions against the liability of [the beneficiary] for contracts and debts." Moorehead's Estate, 289 Pa. at 548, 137 A. at __ (emphasis in original) [page omission in original Opinion]. Nowhere does the court mention that such protections are against public policy.

In one of the first cases addressing spendthrift trusts in Pennsylvania, our supreme court specifically noted that spendthrift trusts are not against public policy, stating, "[n]or is such a [spendthrift] provision contrary to the policy of the law or to any act of assembly. Creditors cannot complain, because they are bound to know the foundation upon which they extend their credit." Fisher v Taylor, 2 Rawle 33, 37 (1829). For the reasons stated above, the Widener and Bigelow trusts are not contrary to public policy; therefore, appellants' second argument must fail.

We conclude that the Orphans' Court properly determined that appellants' writs of garnishment should be dismissed. The court correctly applied the law and, therefore, we find no abuse of discretion. In re Benson, supra. Having decided that the learned Orphans' Court Judge committed no error, we need not address appellants' second issue on appeal.[4]

Order affirmed.

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[4] Appellants also suggest that the Orphans' Court's "rigid interpretation of the spendthrift trust rule constitutes a taking of . . . [appellant's] property rights without due process of law, in violation of the Fourteenth Amendment." This claim is not included in appellants' Statement of Questions Involved and, therefore is waived. See Pa.R.A.P. 2116(a) (stating "[t]his rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby"); see also Brandt v. Eagle, 412 Pa. Super 171, 602 A.2d 1364 (1992) (argument in brief but not included in Statement of Question Involved is waived).

MARCH 5, 1996 ORDER OF THE COURT OF COMMON PLEAS, ORPHAN'S COURT DIVISION

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

NO. 49535
ESTATE OF JOSEPH E. WIDENER, DECEASED, SUR TRUST
FOR BENEFIT OF G. EUSTIS PAINE, III

NO. 63924

ESTATE OF JOSEPHINE WIDENER BIGELOW, DECEASED,
SUR TRUST FOR BENEFIT OF G. EUSTIS PAINE, III

OPINION SUR WRIT TO GARNISH THE INCOME INTEREST OF G. EUSTIS PAINE, III

OTT, J. **March 5, 1996**

The matter before this court requires a determination of whether the income interest of a spendthrift trust beneficiary can be garnished by the beneficiary's creditors when he resides outside the United States.

Joseph E. Widener ("Mr. Widener") died October 26, 1943, a resident of Montgomery County. His will dated October 29, 1942 and several codicils thereto were probated by the Register of Wills of Montgomery County on November 12, 1943. Item FIFTH of Mr. Widener's will creates a trust of his residuary estate to pay the income to his issue until twenty-one years after the death of the last survivor of his issue living at his death. Ultimately, the principal of the residuary trust was divided into three separate trusts, with one of those trusts itself divided into four separate trusts, one of which is held for the benefit of G. Eustis Paine, III, ("Mr. Paine") and his descendants. This court has assumed continuing jurisdiction over the Widener Trusts since 1948.

Mr. Widener's daughter, Josephine Widener Bigelow ("Mrs. Bigelow") died on March 6, 1961, a resident of Palm Beach, Florida. Item XIII of Mrs. Bigelow's will establishes a trust for her grandchildren, including Mr. Paine. The third paragraph of Item XVIII of Mrs. Bigelow's will provides that the situs of the trust shall be in Pennsylvania, and the trustee shall account only to the Pennsylvania courts. This court has assumed continuing jurisdiction over the Bigelow Trusts since 1963.

During 1994, PNC Bank, N.A., ("Trustee"), in its capacity as Trustee for both the Widener and Bigelow Trusts, paid Mr. Paine, as income beneficiary, monthly distributions aggregating more than $150,000. These distributions were effected through March of 1994 by crediting Mr. Paine's PNC Bank checking account #437-434-7. Mr. Paine has, at various times, resided in France, Switzerland and the Virgin Islands, and, at such times, requested that income distributions be wired by Trustee to him in those locations. Since April of 1994, Mr. Paine has resided in Cabo San Lucas, Mexico, and, in that month, requested the Trustee thereafter to pay his income distributions under both Trusts to him by wire transfer to his bank account at Banco Nacional de Mexico. Since June of 1994, Trustee has complied with this directive.

On May 23, 1994, Bowne of Phoenix, Inc. ("Bowne") obtained a default judgment against Mr. Paine in the Superior Court of Arizona, Maricopa County, in the amount of $161,513.95. On July 8, 1994, AmerSig Graphics, Inc. ("AmerSig") obtained a default judgment in the same court against Mr. Paine in the amount of $1,084,402.59. Bowne and AmerSig domesticated their judgments in the Court of Common Pleas of Philadelphia County on August 26, 1994.

On November 8, 1994, Trustee was served by the Sheriff of Philadelphia County with writs of attachment for the Bowne and AmerSig judgments to levy against all assets of Mr. Paine in its possession. Specifically, the writs seek to garnish Mr. Paine's income interests in the two trusts. By Order dated March 23, 1995, the Philadelphia Court consolidated the garnishment actions. To date, Trustee has paid no sums to either Bowne or AmerSig pursuant to the levies.

Because both the Widener Trust and the Bigelow Trust are subject to the continuing jurisdiction of the Orphan's Court Division of the Court of Common Pleas of Montgomery County, on May 11, 1995, Trustee filed a motion requesting the Philadelphia Court to transfer the garnishment actions to this court, alleging a lack of subject matter jurisdiction in the former court under 42 Pa.C.S.A. §5103. By Order dated July 31, 1995, the Philadelphia Court transferred the garnishment actions to this court.

The undersigned met with counsel for the creditors and Trustee on November 2, 1995. It was agreed that the parties would submit a joint stipulation as to all pertinent facts which would permit the issue to be submitted on briefs and argument. A joint stipulation dated December 21, 1995 was filed on January 10, 1996. Thereafter, comprehensive briefs were submitted and argument was held on February 28, 1996.

DISCUSSION

The wills establishing each of the trusts in question contain express spendthrift provisions. Item SEVENTH of the Widener will states:

> Wherever herein I have provided for the payment of principal or income to any beneficiary, I direct that the same shall not be subject to attachment, execution, sequestration, or to any order of court, and that the beneficiary shall have no power to alienate or anticipate said payments or encumber the same, nor shall said principal or income be liable for the contracts, debts or engagements of any beneficiary.

Likewise, Item XVI of the Bigelow will provides:

> No interest of any beneficiary under this Will or any Codicil hereto shall be subject to anticipation or voluntary or involuntary alienation.

Bowne and AmerSig concede that these are classic spendthrift provisions and that they govern the trusts in question.

No particular language is necessary to create a spendthrift trust. It is sufficient if a testator manifests an intention to create such a trust. See Restatement of Trust 2d, §152, Comment c. The legitimacy of spendthrift trusts has long been settled in this Commonwealth. Fisher v. Taylor, 2 Rawle 33 (1829). The protection afforded spendthrift trusts stems solely from the principle that the donor of the gift can subject it to such legal conditions as he deems appropriate:

> The law rests its protection of what is known as a spendthrift trust fundamentally on the

> principle of cujus est date, ejus est disponere. It allows the donor to condition his bounty as suits himself, so long as he violates no law in so doing. When a trust of this kind has been created, the law holds that the donor has an individual right of property in the execution of the trust; and to deprive him of it would be a fraud on his generosity. . . . It is always to be remembered that consideration for the beneficiary does not even in the remotest way enter into the policy of the law; it has regard solely to the rights of the donor. Spendthrift trusts can have no other justification than is to be found in considerations affecting the donor alone. They allow the donor to so control his bounty, through the creation of a trust, that it may be exempt from liability for the donee's debts, not because the law is concerned to keep the donee from wasting it, but because it is concerned to protect the donor's right of property.

Morgan's Estate, 223 Pa. 228, 230, 72 A. 498, 499 (1909).

When a testator clearly expresses an intent to subject the income of a testamentary trust to a spendthrift provision, the income is exempt from execution in the hands of the trustee because the income of a spendthrift trust "remains the testator's property until it is actually paid to the beneficiary." Fox's Estate, 264 Pa. 478, 480, 107 A. 863, 864 (1919); Riverside Trust Co. v. Twitchell, 342 Pa. 558, 562, 28 A.2d 768 (1941); Vant v. Gish, 111 Pitts.L.J. 265 (1963). Indeed, spendthrift provisions in a will protect a legacy while "in transit from executor to legatee." Goe's Estate, 146 Pa. 431, 433, 23 A. 383 (1892); Scott Estate, 7 Fid.Rep. 218, 221 (O.C. Montg. 1957). In every case, the effect of a valid spendthrift

provision is that the income can be attached, if at all, only in the hands of the beneficiary.

In response to the Trustee's position that the funds sought to be garnished are protected, the creditors point out that creditors may attach and execute upon the trust property, as with any other property, after the beneficiary has actually received it. Board of Charities and Corrections of City of Philadelphia v. Lockhard, 198 Pa. 672 (sic), 48 A. 496 (1901). From this principle, the credits invent a premise that, unless they can conveniently attach the property in the hands of the beneficiary, the protection from attachment provided by the spendthrift provision is not available to the trustee. In the words of the creditors, "[t]he rule of spendthrift trust assumes a means of attachment besides interception of the trust income in the possession of the trustee."[1] Instantly, the creditors assert there are no "normal steps" that can be taken to reach the trust income in the hands of Mr. Paine, because he resides in Mexico. Consequently, they insist the customary protection afforded the funds while in the hands of the trustee ought not obtain. Although the creditor's brief contains extensive citations, none of the cited authorities support this proposition.

The ability of a creditor to reach a beneficiary's assets, and the protection long afforded spendthrift trusts, have no relation at all. When the income is in the trustee's hands, the spendthrift provision protects it because of the donors right to condition his gift. Once the income is in the beneficiary's hands, the donor can no longer impose such conditions. To suggest that the only reason attachment was not permitted in every spendthrift trust case is because there was a convenient route by which the creditor could attach the funds in the hands of a beneficiary, defies logic and common sense. If the creditors were right, spendthrift trust law would be converted into a rule of law offering a

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[1]Creditor's brief at pp. 6, 7.

varying degree of protection to a trust's income based upon the creditor's relative ability or inability to reach the beneficiary directly. Thus, a beneficiary's income interest might be attachable simply because he resides in a state whose laws provide exemptions from execution that are too generous, or a procedure too complicated, for the creditor's purposes. Such a rule would be completely unworkable. We can easily imagine that trusts with beneficiaries residing in different jurisdictions could be subject to inconsistent interpretations of the same spendthrift trust language. That result would fly in the face of the only true consideration in the law of spendthrift trust (sic) - honoring the donor's right to impose a restriction on his gift.

As an alternative means of reaching Mr. Paine's income prior to distribution by the Trustee, the creditors invoke the Pennsylvania Uniform Fraudulent Transfer Act[2] which became effective on February 1, 1994. Even if we were to infer a fraudulent motive on the part of Mr. Paine from the stipulated facts before us, this Act is unavailing to Bowne and AmerSig. The Act, by its terms, pertains only to transfers made by debtors. 12 Pa.C.S.A. §5104. Thus, it is inapplicable to the situation here, where the transfer is from the Trustee to the debtor beneficiary. Indeed, the Orphan's Court Division of this court has jurisdiction over this controversy only to the extent that we are dealing with the trusts. If the creditors seek to invoke the Uniform Fraudulent Transfer Act against Mr. Paine, they must necessarily bring their actions in the civil division of a court having jurisdiction over Mr. Paine.

In light of the foregoing, the following Order is appropriate.

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[2]12 Pa.C.S.A. §5101 et seq.

DECREE

AND NOW, this 5th day of March, 1996, plaintiff's writ to garnish the income interest of G. Eustis Paine, III, with respect to the within trusts is DENIED AND DISMISSED.

This is a final Order and not subject to the filing of exceptions.

BY THE COURT:

_____

J.

Copies of the above
mailed March 5, 1996, to:

James F. Mannion, Esquire
Counsel for PNC Bank, N.A.
Robert T. Orr, Esquire
Counsel for AmerSig and Bowne, Creditors

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

ORPHANS' COURT DIVISION

ESTATE OF JOSEPH E. WIDENER, DECEASED, SUR TRUST FOR BENEFIT OF G. EUSTIS PAINE III **No.49535**

-and-

ESTATE OF JOSEPHINE WIDENER BIGELOW, DECEASED SUR TRUST FOR BENEFIT OF G. EUSTIS PAINE,III **No.63924**

APPEAL OF: AMERSIG GRAPHICS, INC., AND BOWNE OF PHOENIX,INC.

JOINT STIPULATION

TO THE HONORABLE, THE JUDGES OF SAID DIVISION:

Plaintiffs, AmerSig Graphics, In. ("AmerSig") and Bowne of Phoenix, Inc. ("Bowne"), by their undersigned attorneys, and PNC Bank, N.A., as Trustee (the "Trustee") of the Trust under Will of Joseph E. Widener, Deceased for benefit of G. Eustis Paine, III (the "Widener Trust") and the Trust under Will of Josephine Widener Bigelow, Deceased for benefit of G. Eustis Paine, III (the "Bigelow Trust") (collectively, the "Trusts"), by its undersigned attorneys, jointly stipulate as follows:

1. On July 8, 1994, AmerSig obtained a default judgment in the Superior Court of Arizona, Maricopa County, against Defendants Kachina Publications, Inc., G. Eustis Paine, III ("Mr. Paine") and Sally J. Paine ("Mrs. Paine") in the amount of $1,084,402.59 (the "AmerSig Judgment"). AmerSig domesticated the AmerSig Judgment

in the Trial Division of the Court of Common Pleas of Philadelphia County, Pennsylvania (the "Philadelphia Court") on August 26, 1994.

2. On May 23, 1994, Bowne obtained a default judgment in the Superior County (sic) of Arizona, Maricopa County, against Defendants Arizona Golf House, Inc., Kachina Publications, Inc., VP International, Inc., Paradise Sports, Inc., and Mr. and Mrs. Paine doing business as "Pandor Fine Arts," "Golf Illustrated" and "Fairways and Greens," in the amount of $161,513.95 (the "Bowne Judgment"). Bowne domesticated the Bowne Judgment in the Philadelphia Court on August 26, 1994.

3. On November 8, 1994, Trustee was served by the Sheriff of Philadelphia County with writs of attachment for the AmerSig Judgment and the Bowne Judgment to levy against all assets of Mr. Paine in its possession. Specifically, the writs seek to garnish Mr. Paine's income interests in the Widener Trust and the Bigelow Trust. (Hereinafter, the consolidated actions on the AmerSig Judgment and the Bowne Judgment are referred to as the "Garnishment Actions").

4. By Order dated March 23, 1995, the Philadelphia Court consolidated the Garnishment Actions.

5. Both the Widener Trust and the Bigelow Trust are subject to the continuing jurisdiction of the Orphans' Court Division of the Court of Common Pleas of Montgomery County, Pennsylvania (the "Court"), and the Court has exercised exclusive jurisdiction over both Trusts as reflected in the Court's official dockets.

6. On or about May 11, 1995, Trustee filed a motion requesting the Philadelphia Court to transfer the Garnishment Actions to the Court pursuant to 42 Pa.C.S.A. § 5103, for lack of subject matter jurisdiction. By Order dated July 1, 1995, the Philadelphia Court transferred the Garnishment Actions to the Court.

7. During 1994, Trustee paid Mr. Paine, as income beneficiary, the following income distributions from the Widener Trust:

Date	Amount Paid
January 13, 1994	$2,500.00
January 24, 1994	$4,043.71
February 24, 1994	$1,256.20
March 14, 1994	$4,000.00
March 24, 1994	$5,124.64
April 25, 1994	$6,955.10
May 16, 1994	$ 904.34
May 25, 1994	$ 463.84
June 27, 1994	$9,982.17
August 25, 1994	$3,969.34
September 26, 1994	$11,411.66
October 25, 1994	$6,802.63
November 25, 1994	$4,031.68
December 27, 1994	$11,592.06

8. During 1994, Trustee paid Mr. Paine, as income beneficiary, the following income distributions from the Bigelow Trust:

Date	Amount Paid
January 24, 1994	$7,965.84
February 24, 1994	$7,606.96
March 24, 1994	$2,771.96
April 25, 1994	$7,501.17
May 25, 1994	$6,502.10
June 27, 1994	$2,768.34
July 25, 1994	$9,361.68
August 25, 1994	$7,866.37
September 26, 1994	$2,878.62
October 25, 1994	$6,737.63
November 25, 1994	$7,889.47
December 27, 1994	$3,946.20

9. True and correct copies of the Will and Codicils of Joseph E. Widener are attached as Exhibit A.

10. True and correct copies of the Will and Codicil of Josephine Widener Bigelow are attached as Exhibit B.

11. Payments under the Widener Trust were made by Trustee to Mr. Paine for January through March and May 16, 1994 by crediting Mr. Paine's checking account number 437-434-7 held with Trustee, PNC Bank, N.A., in its corporate capacity (the "Checking Account").

12. Payments under the Bigelow Trust were made by Trustee to Mr. Paine for January through March, 1994 by crediting the Checking Account.

13. In April, 1994, Mr. Paine requested the Trustee to thereafter pay income distributions under both Trusts to him by wire transfer to his bank account at Banco Nacional de Mexico.

14. In May 1994, Mr. Paine closed the Checking Account.

15. Since June 1994, Trustee has paid all income distributions due to Mr. Paine under both Trusts to him by wire transfer to Banco Nacional de Mexico.

16. Since April 1994, Mr. Paine resides in Cabo San Lucas, Mexico.

17. To date, Trustee has paid no sums to Plaintiffs, AmerSig and Bowne, pursuant to Garnishment Actions.

18. Mr. Paine has, at various times, resided in France, Switzerland and the Virgin Islands, and at such times has requested that income distributions be wired by Trustee to him in such locations.

19. This Joint Stipulation is provided by agreement of AmerSig, Bowne and Trustee to allow the Court to consider the legal issue raised by the Trustee of whether the spendthrift provisions of the Wills in question prevent the requested garnishment of Mr. Paine's income interests in the Trusts.

20. The undersigned attorneys are authorized to execute this Joint Stipulation on behalf of their respective clients.

Respectfully submitted

_____

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_____

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Attorneys for Garnishee, PNC Bank, as
Trustee of the Trust under Will of
Joseph E. Widener for benefit of G. Eustis Paine III.

- and -

As Trustee of the Trust under Will of
Josephine Widener Bigelow for benefit of
G. Eustis Paine, III.

Dated: December 21, 1995

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ESTATE OF JOSEPH E. WIDENER, DECEASED, SUR TRUST FOR BENEFIT OF G. EUSTIS PAINE, III

* * * *

ESTATE OF JOSEPHINE E. WIDENER BIGELOW, DECEASED, SUR TRUST FOR THE BENEFIT OF G. EUSTIS PAINE, III

PETITION OF: AMERSIG GRAPHICS, INC., BOWNE OF PHOENIX,INC.

No. 104 Middle District
Allocatur Docket 1997

Petition for Allowance of
Appeal from the Superior Court

ORDER

PER CURIAM:

AND NOW, this 11th day of August, 1997, the Petition for Allowance of Appeal is hereby **DENIED.**

It is further ordered that Petitioners' Motion for the Admission of James B. Reed, Esquire, pro hac vice, is GRANTED.

August 13, 1997
Shirley Bailey
Chief Clerk